Crystal Realty Marketing Sdn Bhd v Hicom United Leasing Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–35 OF 2006-II
HAMID SULTAN JC
29 JUNE 2007

Civil Procedure — Affidavits — Service of — Affidavit in reply not served within 14 days — Whether the application should be struck out for non-compliance — Whether failure to reply treated as an admission — Evidence Act 1950 — Subordinate Court Rules 1980 O 24 r 4(2)(b)

By an agreement, the appellant hired from the respondent equipment and it was duly delivered. The appellant however defaulted on the monthly rental payment despite reminders and it stated that its board of directors had never resolved nor authorised any such agreements, that the hire agreement had been tampered with and the respondent had not replied to its affidavit in opposition. The respondent argued that after the equipment was delivered, it was never told by the appellant that the equipment had not requested for. The respondent in the court below had taken a preliminary issue as to the non-compliance of the rules of procedure, ie the failure to serve the affidavit within 14 days as in O 24 r 4(2)(b) of the Subordinate Court Rules 1980 ('SCR'). To this the appellant answered that the respondent's counsel had not objected to this when the case first came up for hearing and this amounted to a waiver of the right to object and that the appellant's affidavit was served within 14 days of the date of service of the sealed copy of the respondent's application. On the issue of the resolution, the respondent stated that it was a matter within the internal management of the appellant and the respondent was entitled to assume that all necessary acts were duly performed and the hire agreement was signed by the appellant's representative and was binding. The appellant replied that there were no resolutions made authorising its directors to enter into any agreements; the documents were not tampered with as it had a copy of it and because of the non-reply from the respondent, it was to be treated as an admission. The learned judge in the court below allowed the respondent's application to strike out the appellant's defence pursuant to the SCR.

Held, allowing the appellant's appeal with costs:

(1) On the issue of non-compliance, matters must be heard on merits and

must not be dismissed for non-compliance of rules, unless such non-compliance could not be remedied and/or compensated by costs. The respondent's taking the issue of non-compliance purely to defeat substantive justice was a matter which the courts would not condone (see para 11).

(2) On the issue of resolution relating to internal management rule, the decision in High Court Kuching Civil Appeal No 12-43-2006-I; *Crystal Machineries Sdn Bhd v Hicom United Leasing Sdn Bhd* set out the general proposition of the law. Such issues may be relevant to support the contention of the appellant to rebut the case of the respondent in the event there was other independent evidence to show that there was in fact no agreement at all (see para 12).

(3) On the issue of whether failure to reply to any positive assertions ought to be treated as an admission, the position stated in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 where it was held that in evaluating affidavit evidence, where one party makes a positive assertions upon a material issue, the failure of his appointment to contradict it is usually treated as an admission by him of the fact so asserted is correct exposition of the law. However, there are number of exceptions which were not spelt out. It must not be taken as admission if it was not relevant to the issues. Such reasoning would accord with the spirit and intent of the Evidence Act 1950 ('EA ') although the EA is not applicable to evidence by affidavit (see paras 12–13).

(4) The court should only give due weight to the allegation, if it was relevant to the case. Further, the mere fact that an allegation which may be relevant and has not been challenged by the other party should not be presumed by the court to be the truth (see para 14).

(5) On the issue of tampering, since it was founded on some allegation that there was tampering, a trial proper would be the best mode to deal with such issues (see para 15).

(6) The law in respect of striking out pleadings must not be seen as one area of substantive law. It is purely a procedural law which must be exercised in the rarest of the rarest case not because ultimately the defendant may not succeed. The appellant's defence as pleaded was not frivolous, vexatious and an abuse of process of court on the face of pleadings. The appellant's defence ought not to have been struck out (see paras 15–16).

[Bahasa Malaysia summary

Melalui satu perjanjian, perayu telah menyewa peralatan daripada responden yang telah dihantarkan. Perayu bagaimanapun telah gagal membuat bayaran sewaan bulanan meskipun telah diberi peringatan dan ia menyatakan bahawa

lembaga pengarahnya tidak pernah memberi kebenaran membuat perjanjian sedemikian, bahawa perjanjian penyewaan tersebut telah diubah dan responden tidak menjawab afidavit tentangannya. Responden berhujah bahawa selepas peralatan tersebut dihantar, ia tidak diberitahu oleh perayu yang peralatan tersebut tidak diminta. Responden di mahkamah rendah telah memulakan isu awalan berhubung ketidakpatuhan peraturan prosedur, iaitu kegagalan untuk menyerahkan afidavit dalam tempoh 14 hari seperti dalam A 24 k 4(2)(b) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'). Berhubung ini perayu telah menjawab bahawa peguam responden tidak membantah apabila kes pada mulanya didengar dan ini membentuk penepian hak untuk membantah dan bahawa afidavit perayu telah diserahkan dalam tempoh 14 hari dari tarikh serahan salinan bermeterai permohonan responden. Berhubung isu resolusi, responden menyatakan bahawa ia satu perkara dalam pengurusan dalaman perayu dan responden berhak untuk mengandaikan bahawa segala tindakan sewajarnya telahpun dilaksanakan dan perjanjian penyewaan tersebut telah ditandatangani oleh wakil perayu dan adalah mengikat. Perayu menjawab bahawa tiada resolusi yang dibuat memberi kuasa kepada pengarah-pengarahnya untuk memasuki apa-apa perjanjian, dokumen-dokumen tersebut telah diubah kerana ia mempunyai salinannya dan oleh kerana tiada jawapan daripada responden, ia dianggap sebagai satu pengakuan. Hakim yang bijaksana di mahkamah rendah telah membenarkan permohonan responden untuk membatalkan pembelaan perayu menurut KMR.

Diputuskan, membenarkan rayuan perayu dengan kos:

(1) Berhubung isu ketidakpatuhan, perkara-perkara hendaklah didengar berdasarkan merit dan tidak patut ditolak kerana ketidakpatuhan kaedah-kaedah, kecuali ketidakpatuhan sedemikian tiada remedi dan/atau diberi pampasan dengan kos. Responden dengan mengambil isu ketidakpatuhan semata-mata untuk menggagalkan keadilan substantif merupakan satu perkara yang mana mahkamah tidak boleh biarkan berlaku (lihat perenggan 11).

(2) Berhubung isu resolusi berkaitan peraturan pengurusan dalaman, keputusan di Mahkamah Tinggi Rayuan Sivil No 12-43-2006-I; *Crystal Machineries Sdn Bhd v Hicom United Leasing Sdn Bhd* membentangkan kenyataan am undang-undang. Isu-isu sebegini mungkin relevan untuk menyokong hujah perayu untuk mematahkan kes responden sekiranya terdapat keterangan berasingan yang menunjukkan sememangnya tiada perjanjian langsung (lihat perenggan 12).

(3) Berhubung isu sama ada kegagalan untuk menjawab apa-apa penegasan positif patut dianggap sebagai satu pengakuan,kedudukan yang dinyatakan dalam *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1

MLJ 281di mana ia memutuskan bahawa dalam meneliti keterangan afidavit, di mana satu pihak membuat penegasan positif berhubung isu penting, kegagalan pelantikannya untuk menyangkalnya biasanya dianggap sebagai satu pengakuan olehnya tentang fakta yang ditegaskan sebagai penjelasan undang-undang yang betul (liaht perenggan). Bagaimanapun, terdapat beberapa pengecualian yang tidak dinyatakan. Ia tidak patut dianggap sebagai satu pengakuan jika ia tidak relevan kepada isu-isu. Hujah sedemikian hendaklah bersesuaian dengan maksud tersirat dan niat Akta Keterangan 1950 ('AK') meskipun AK tidak terpakai untuk keterangan melalui afidavit (lihat perenggan 12–13).

(4) Mahkamah hendaklah hanya menimbangkan pengataan tersebut, jika ia relevan kepada kes. Tambahan pula, fakta semata-mata bahawa pengataan yang mungkin relevan dan tidak dicabar oleh pihak satu lagi tidak boleh dianggap oleh mahkamah sebagai yang benar (lihat perenggan 14).

(5) Berhubung isu pengubahan, memandangkan ia didapati dalam beberapa pengataan bahawa telah berlaku pengubahan, satu perbicaraan patut diadakan untuk mengendalikan isu sebegini (lihat perenggan 15).

(6) Undang-undang berkaitan pembatalan pliding tidak patut dilihat sebagai satu bidang undang-undang substantif. Ia semata-mata satu undang-undang prosedur yang patut digunakan dalam kes yang jarang sekali berlaku kerana sudahnya defendan tidak akan berjaya. Pembelaan perayu seperti yang diplidkan tidaklah remeh, menyusahkan dan satu penyalahgunaan proses mahkamah berdasarkan pliding tersebut. Pe,belaan perayu tidak sepatutnya dibatalkan (lihat perenggan 15–16).]

Notes

For cases on service of affidavit, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 477–481.

Cases referred to

Abu Baker bin Haji Yusuf v Mohd Hamzah bin Hanapiah & Anor [1978] 2 MLJ 78 (refd)

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Chan Thiam Teng v Ban Swee Heng Sdn Bhd (refd)

Cold Storage Singapore Pte Ltd v Management Corp of Chancery Court [1992] 1 SLR 521 (refd)

Crystal Machineries Sdn Bhd v Hicom United Leasing Sdn Bhd High Court Kuching Civil Appeal No 12–43–2006-I (refd)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1 (refd)

Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Ors OP-26–05–2006-II (refd)
Davy v Garrett (1877) ChD 473 (refd)
Elite Jewellers Sdn Bhd v Wong Tin Kai [1998] 6 MLJ 511 (refd)
Famous Ltd v Ge Im Ex Italia SRL Times 3 August 1987 (refd)
Malayan Banking Bhd v Lim Tee Yong & Ors [1994] 3 MLJ 715 (refd)
Malaysian Indian Congress & Ors v Makkal Osai Sdn Bhd & Anor [2001] 2 MLJ 253 (refd)
MBf Factors Sdn Bhd v Ban Hoo Electrical & Furniture Sdn Bhd [1999] 6 MLJ 721 (refd)
Mokhtar bin Amin v Mohamed Mokhtar bin Omar [2001] 4 MLJ 329 (refd)
Morris v Kanssen & Ors [1946] 1 All ER 586 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Pendakwa Raya lwn Che Saufi bin Kadir [2005] 6 MLJ 159 (refd)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)
Pertamina v Kartika Ratna Thahir & Ors [1983] 1 MLJ 136 (refd)
Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd [1998] 2 MLJ 83 (refd)
Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd [1997] 1 MLJ 581 (refd)
Tunku Abdul Rahman Putra Al-Haj & Ors v Dato Seri Dr Mahathir Mohamed [1989] 1 MLJ 48 (refd)
Usman bin Ahmad v Chin Brothers Construction Co [2001] 5 MLJ 281 (refd)

Legislation referred to

Evidence Act 1950 ss 3, 5–55
Rules of the High Court 1980 O 18 r 19, O 92 r 4, O 32 r 13(2)(b)
Subordinate Courts Rules 1980 O 24 r 4(2)(b)

Abang Halit bin Abang Malik (Loke King & Goh) for the appellant/defendant.
Susan Gau (Chan & Gan Advocates) for the respondent/defendant.

Hamid Sultan JC:

[1] This is my judgment in respect of the appellant/defendant's appeal against the decision of the learned sessions judge who allowed the respondent/plaintiff's application to strike out the defendant's defence pursuant to Subordinate Courts Rules 1980 ('SCR 1980').

[2] The gist of the respondent's claim can be summarised as follows: (i) by an agreement the appellant hired from the respondent an equipment subject to the terms and condition therein contained. (ii) the equipment were duly delivered to the appellant; (ii) the appellant breached the agreements by defaulting to pay the monthly rentals amounting to RM30,310 with interest, etc and failed to remedy the same despite repeated reminders; (iii) the

appellant's defence is based on the following issues namely: (a) the board of directors of the appellant has never resolved nor authorised any of its directors to enter into any agreements with the respondent. (b) the hire agreement had been tampered. (c) the respondent has never replied to the appellant's affidavit in opposition.

[3] The respondent says that (a) the equipment in the hire agreement was delivered to the appellant at their site. Ever since the delivery of the equipment, the appellant never informed the respondent that they had never requested for the hire of the equipment, and the equipment continued to be kept at their site. (b) if the appellant had never entered into the hire agreement, they would have at that time, questioned the delivery of the equipment to their site. However, the equipment remained at the appellant's site without any protest or dispute by the appellant and that too for more than a year.

[4] The respondent in the court below had taken preliminary issue as to non-compliance of rules of procedure, that is the failure to file and serve affidavit within 14 days within the time provided for in O 24 r 4(2)(b) of SCR 1980 and relies on the following cases namely:

(a) In the case of *Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd* [1998] 2 MLJ 83, where Steve Shim J (as he then was) held that:

> Such omission and failure [to state reasons for the delay or to apply for an extension of time to serve the affidavit] would have a prohibitive or restrictive effect on the court in considering any affidavit filed out of time … This court could not be seen to be condoning the negligence or mistake of the Respondent/Plaintiff at the expense and prejudice of the appellant/defendant (see p 89B–E); *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678 and *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436 followed.

(b) In the case of *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581, the court held that:

> the critical words in O 32 r 13(2) … are 'within 14 days from the date of the filing of the application' and in O 32 r 13(2)(b) within 14 days from the date of service.

(c) In *MBf Factors Sdn Bhd v Ban Hoo Electrical & Furniture Sdn Bhd* [1999] 6 MLJ 721, the court held that:

> The language of O 24 r 4(2)(b) the SCR is clear — that time starts to run from the date of the service of the affidavit on the plaintiff, even when the application which the affidavit to be used in support is unsealed but only

filed in court (see p 723C); *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 followed; *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 not followed.

[5] The appellant's response to the issue of non-compliance is as follows:

(a) the respondent's counsel had not objected to the said affidavit in opposition, when the case first came up for hearing. The respondent's counsel only raised the preliminary objection on the second hearing date. This amounted to a waiver of the respondent's right to object and as such, the respondent was estopped from raising any objection and relies on the case of *Malayan Banking Bhd v Lim Tee Yong & Ors* [1994] 3 MLJ 715 where Mohd Hishamudin JC (as he then was) held that the appellant's counsel's failure to object but instead asked for a postponement to file affidavit in reply when the case first came up for hearing amounted to a waiver of the appellant's right to object and they were estopped from raising any objection under O 32 r 13(2)(b) of RHC 1980 (which is in pari materia with O 24 r 4(2)(b) of SCR 1980).

(b) time would run from the date of service of the sealed copy of the application as being held by the Court of Appeal in *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 in contrast to the decision of *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holding Sdn Bhd*; [1997] 1 MLJ 581. By applying the decision in *Perbadanan Nasional Insurans Sdn Bhd*, the appellant's affidavit in opposition served on the respondent's advocates was within the 14 days' period from the date of service of the sealed copy of the respondent's application.

(c) although there are two conflicting decision of Court of Appeals in this point which are both equally binding on the High Court, the appellant says the decision in *Perbadanan Nasional Insurans Sdn Bhd* ought to be followed.

(d) in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, the Federal Court held that the court in the tiers below the Court of Appeal may choose between two conflicting decisions, irrespective of the dates of those conflicting decisions.

(e) in *Elite Jewellers Sdn Bhd v Wong Tin Kai* [1998] 6 MLJ 511, Abdul Malik Ishak J preferred the decision in *Perbadanan Nasional Insurans Sdn Bhd* when confronted with a similar situation (see *Usman bin Ahmad v Chin Brothers Construction Co* [2001] 5 MLJ 281 and *Malaysian Indian Congress & Ors v Makkal Osai Sdn Bhd & Anor* [2001] 2 MLJ 253).

[6] On the issue that there was no resolution authorising the appellant's director to enter into the agreement, the respondent says:

(a) whether the appellant had made a resolution to enter into the hire agreement with the appellant is not within the knowledge of the respondent. These are matters within the internal management of the appellant and the respondent is entitled to assume that all the necessary acts in the appellant company have been properly and duly performed (see *Morris v Kanssen & Ors* [1946] 1 All ER 586).

(b) the hire agreement bears the appellant's name and company stamp, and was signed by the appellant/defendant's representative. This is enough for the respondent to rely on as showing that they were legitimately dealing with the appellant.

(c) in the recent case of High Court Kuching Civil Appeal No 12–43–2006-I; *Crystal Machineries Sdn Bhd v Hicom United Leasing Sdn Bhd* decided on 28 February 2007 the facts which are similar with this instant case, the High Court there found that there is no law to say that the hire agreement requires the seal of the company and the resolution of the company. The manner of entering into the hire agreement and whether there was a board resolution for that purpose are matters within the internal management of the company and the respondent is not expected to know the same. The appellant's appeal was therefore dismissed.

[7] On the above issue, the appellant says there were no resolutions made by the appellant's board of directors, authorising its directors to enter into any agreement with the respondent. The agreement is therefore not binding upon the appellant in this case. To assert the same the appellant relies on the following cases:

(a) In *Mahfuz bin Hashim v Koperasi Pekebun Kecil Daerah Segamat & Ors* [2005] 3 MLJ 726, where Jeffrey Tan J held that "there was no power to the Chairman to execute an agreement without the prior approval of the Board. In the absence of such express power, the second third party could not enter into the agreement without the approval of the board".

(b) In *Chan Thiam Teng v Ban Swee Heng Sdn Bhd*; [1992] 2 MLJ 583, it was held that a resolution properly passed is binding on the defendants and until it is dissolved, cancelled or annulled, expressly or by implication, it binds the defendants on action taken by its director, who acted within the ambit of the resolution.

[8] On the issue of tampering of the documents, the respondent says the appellant is in possession of a copy of the hire purchase agreement. In consequence, the appellant cannot on the one hand deny that it had

entered into the hire agreement with the respondent and on the other hand, allege that the hire agreement had been tampered with.

[9] In response to the above issue, the appellant says the document which has been tampered with is totally different from the agreement in the possession and custody of the defendant and relies on the case of *Pendakwa Raya lwn Che Saufi bin Kadir* [2005] 6 MLJ 159.

[10] Finally, the appellant complains that the respondent had not replied to the appellant's affidavit in opposition and in consequence must be treated as admission and relies on the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 where it was held that: 'In evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his appointment to contradict it is usually treated as an admission by him of the fact so asserted'.

[11] I have read the appeal record and the submission of the parties in detail. On the issue of non-compliance, I do not see much relevance in the cases the respondent has submitted. For, the decisions stated in those cases must be read with the new amendments to rules of procedure and the vibrant decisions of our apex court which has repeatedly affirmed that matters must be heard on merits and must not be dismissed for non-compliance of rules, unless such non-compliance cannot be remedied and/or compensated by costs. The respondent by taking the issue of non-compliance purely to defeat substantive justice is a matter which the courts now will not condone. I have dealt with this area of law in my judgment delivered on 25 April 2007 in the case of *Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Ors* OP-26–05–2006-II and I reproduce the relevant parts for the purpose of this appeal which reads as follows:

15. Court's time is often unnecessarily wasted by procedural objections and technicalities raised without regard to rules and case laws which condone procedural non-compliance. To avert frivolous objections it is an opportune moment to summarise the rules and principles in vogue and they are as follows:

    (a) As a general rule, the parties to a civil proceeding must strictly comply with the rules of the court. However where parties have by reason of anything done or left undone failed to comply with the requirements of the rules of the court, whether in respect of time, place, manner, form or content or in any other respect, the court is required to treat the failure of non-compliance as an irregularity and the failure does not nullify the proceedings or any steps taken in the proceedings or any documents, judgment or order therein. This rule has a number of exceptions and will only appear to cover steps taken

in the course of commencement of any proceedings and will not include any steps which is a condition precedent before instituting proceedings.

(b) Dismissal of an action for non compliance of procedural rules has been an anathema in procedural jurisprudence. To avert procedural miscarriage of justice, order 2 of the Supreme Court Practice (white book) was introduced in England. It was meant to be a saving provision to condone procedural irregularities. However, some English judges often defied this sacrosanct provision and in consequence matters were dismissed without merits being heard. The English position is aptly described by Sir Jack I.H. Jacob in his book 'The reform of the Civil Procedure Law and other Essays in Civil Procedure London', 1982, London, Sweet & Maxwell at p 214 as follows:

> A change of fundamental importance was made in relation to the effect of non-compliance with the requirements of the Rules. In all such cases, such non-compliance whatever form it takes must be treated, not as a nullity, but as an irregularity which the court will have power to amend or rectify or regularize. This power, together with the extended powers of amendments after the expiry of the current period of limitation, is intended to prevent technical defects or errors in proceedings from being fatal in themselves and to remove some of the blots which 'have marred our copybook.' They go a long way towards reaching out to the rather exuberant remark made by Lord Bowen that 'It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.' This ideal state has yet to be achieved.

In Malaysia, the Chief Justice Yang Amat Arif Tun Dato' Sri Ahmad Fairuz whilst sitting in Court of Appeal in the case of *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561, has shown the lead and rightly said that procedural and technical objection must not be allowed to obstruct the process of giving justice.

Justice Abdul Hamid Mohamad FCJ sitting in the Court of Appeal in the case of *Hock Seng Construction Sdn Bhd & Anor v Yeoh Poh Owi & Anor* [2001] 4 CLJ 1, had boldly asserted that the main function of the court is to do justice and not just to dispose cases. Further, His Lordship stated that it was unjust to dismiss a matter without hearing merits simply because of the mistake of the solicitor in not complying with the rules.

Justice Gopal Sri Ram JCA had in *Mokhtar bin Amin v Mohamed Mokhtar bin Omar* [2001] 4 MLJ 329, placed the nail on the coffin in respect of procedural objections by stating that non-compliance of procedural

requirements should not be treated as invalidating any action or proceeding or steps taken therein unless it occasions a substantial miscarriage of justice.

(c) From the cases above it is clear that the court has a wide discretion whether to condone or not to condone irregularities. In this context it is noteworthy to be guided by the observation of Suffian LP in the case of *Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 where His Lordship observed:

> The Rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice.
>
> In the bad old days in country-regionplaceEngland from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.
>
> But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.
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> This change of attitude was reflected in the remarks of Lord Collins MR about 70 years ago in Re Coles and Ravenshear:
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> > Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.
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> Today Order 70 rule 1 of our Rules explicitly states that non-compliance with our Rules —
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> > Shall not render any proceedings void unless the court or a judge shall so direct ….

(d) When non-compliance does not occasion any injury and cause no injustice to the opposite party or where they can be sufficiently compensated by costs or other terms imposed by the court, I take the view that the courts have a constitutional duty to hear the cases on merits. However, the power to condone non-compliance though discretionary must be exercised judicially on proper consideration within the spirit of the Federal Constitution and of the special circumstances of each case.

[12] On the issue of resolution relating to internal management rule, the decision in High Court Kuching stated above sets out the general proposition of the law. However, such issues may be relevant to support the contention

of the appellant to rebut the case of the respondent in the event there are other independent evidences to show that there was in fact no agreement at all. On the issue whether failure to reply to any positive assertions ought to be treated as an admission, I take the view that the position stated in *Ng Hee Thoong & Anor* is correct exposition of the law (see *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382).

[13] However, the learned judge of the Court of Appeal was very cautious in his proposition and says 'usually treated as admission'. Thus, there are number of exceptions the learned judge must have in mind which was not spelt out. *It must not be taken as admission if it is not relevant* to the issues to be decided before the court. Such reasoning will accord within the spirit and intent of the Evidence Act 1950 ('EA 1950') though EA 1950 is not applicable to evidence by affidavit. The law in this area can be summarised as follows:

(a) Generally, the word relevant in the context of facts means that any two facts when applied are so related to each other that according to the ordinary course of events one, either taken by itself or in connection with the other facts, proves or renders possible the past, present or future existence or non-existence of the other. Relevant in one sense means connected, in another sense means admissible. Section 3 of the EA 1950 defines relevant as: 'One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts'. Where a fact is relevant it need not necessarily mean that the fact will be admissible. Whether a relevant fact is or is not admissible is subject to other provisions of the EA 1950.

(b) Generally, fact means anything of any state or thing capable of being perceived by our senses or any mental condition of which any person is conscious. For example, the existence of a mountain in a particular place is a fact. A man having heard or seen something is a fact. The reputation of a particular person is a fact. Facts can be divided into physical facts and psychological facts. The physical facts are perceived by senses and psychological facts are only a mental condition of a person. The existence of a mountain in a particular place is a physical fact, which can be perceived by our senses. The reputation of a particular person is only a psychological fact showing the mental condition of the person. Facts can be further divided into facts in issue and relevant facts. This classification only serves legal purpose. All rights and liabilities in an action before the court are dependent upon and arise out of the facts of the case. Section 3 of the Act defines fact as: (a) any thing, state of things or relation of things capable of being perceived by the senses; (b) any mental condition of which any person is conscious.

(c) Facts in issue mean the disputed facts or the facts, which need to be proved. Matters, which are alleged by one party to the action and denied by the other, may be stated as facts in issue. What facts are in issue in a particular case is a question to be determined by the substantive law or in some cases by that branch of the law of procedure, which regulates the law of pleadings. For example, A is charged with murder of B. The prosecution as a matter of law must prove the following facts: (a) B died; (b) A only caused the death of B; (c) A had the intention to cause the death of B. These are the main issues to be proved by the prosecution, and these are called facts in issue. Unless these main issues are proved, the accused cannot be convicted. All these issues are connected with one another to assert the charge of murder. If the prosecution fails to prove any one of the issues, the accused will be acquitted. Section 3 of the EA 1950 defines fact in issue to mean any fact from which either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding, necessarily follows. It is submitted that the definition by itself is very wide.

(d) Relevant facts are facts so connected with each other as to prove or disprove the facts in issue. Relevant facts are not themselves issues before the court. However, they are useful inference regarding the facts in issue. For example, A is charged with the murder of B. Here the facts in issue are: (a) whether A caused the death of B; and (b) whether he intended to cause B's death. The fact that A had the motive to kill B and also the opportunity to commit murder are relevant facts for the prosecution. An inference as to the existence of the facts in issue may be drawn from these relevant facts. The distinction between facts in issue and relevant fact is that facts in issue are facts which are in dispute and which form the subject of decision in a case. Relevant facts are connected facts and because of their connection with the principal fact, they lead to an inference as to the existence or non-existence of the facts in issue. Examples of relevant facts may be motive, dying declaration, conspiracy, judgments, confessions, opinions, depending on the nature of the case. What are relevant facts are set out from s 5 to 55 EA 1950 and are exhaustive. The court will not treat any other facts as relevant unless it falls into one of the sections mentioned above.

[14] The court should only give due weight to the allegation, if it is relevant to the case. Further the mere fact that an allegation which may be relevant and has not been challenged by the other party should not be presumed by the court to be the truth. Support for my proposition can be garnered from many cases; to name a few are as follows: (a) *Cold Storage Singapore Pte Ltd v Management Corp of Chancery Court* [1992] 1 SLR 521; (b) *Famous Ltd v Ge Im Ex Italia* SRL Times 3 August 1987.

[15] On the issue of tampering, I take the view that since it is founded on some allegation that there was tampering, a trial proper will be the best mode to deal with such issues. The law in respect of striking out pleadings must not be seen as one area of substantive law. It is purely a procedural law which must be exercised at the rarest of the rarest case not because ultimately the defendant may not succeed. The principles in this area of law can be summarised as follows:

(a) The court may at any stage of the proceedings order to strike out or amend any matter in any pleading which may be unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the action, or which is otherwise an abuse of the process of court. The rule is silent as to when the application must be made. However, case laws say that the application should be made as soon as possible.

(b) The court has always the inherent jurisdiction to strike out any pleadings or to make any order, as may be necessary, to prevent injustice or to prevent an abuse of the process of court (RHC O 92 r 4). In *Davy v Garrett* (1877) ChD 473 it was emphasised that the Court of Appeal will not readily interfere with the discretion of the court of first instance in a matter of procedure. In this case, the statement of claim was in the opinion of the Court of Appeal, calculated to embarrass the defendants by reason of stating immaterial facts, and setting out at great length documents which could not be material except as evidence by way of admission. The court ordered it to be struck out even though a motion for that purpose had been dismissed with costs by the court below.

(c) Under O 18 r 19 of the RHC 1980, a pleading may be struck out on the grounds that: (a) it discloses no reasonable cause of action or defence; or (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court.

All the above grounds arguably will appear to overlap (see *Tunku Abdul Rahman Putra Al-Haj & Ors v Dato Seri Dr Mahathir Mohamed* [1989] 1 MLJ 48). Under this order, the court is also empowered to make such other order on such term as it thinks just. This may include an order that the action be stayed or dismissed or judgment be entered (see *Re Allapitchay Rawther, deceased* [1949] MLJ 60).

(d) In *Abu Baker bin Haji Yusuf v Mohd Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78, the court stated that as a general rule it is only in plain and obvious cases that recourse should be had to this summary procedure. The mere fact that the case is weak and unlikely to succeed is no ground for striking out a pleading. Where the allegation is that the statement of claim discloses no reasonable cause

of action, the plaint and its documents alone should be considered and all allegations in it should be assumed to be true. It must be tried upon the allegations contained in the pleading, and evidence in support of the applicant's case is not admissible.

However, with regard to the second limb of the rule relating to frivolous and vexatious action, the inherent jurisdiction of the court remains unaffected. Affidavits are admissible not by virtue of the rule, but by virtue of the general jurisdiction of the court. The court is entitled to look at the affidavits as to the history of the matter and if in that light, the action was vexatious or frivolous, the pleading could be struck out and the action dismissed.

(e) In *Pertamina v Kartika Ratna Thahir & Ors* [1983] 1 MLJ 136, the court stated that only in plain and obvious cases should recourse be had to the summary process under O 18 r 19 of The Rules of The High Court, 1980. It cannot be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. As long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out.

[16] I take the view that the appellant's defence as pleaded is not frivolous, vexatious and abuse of process of court on the face of pleadings. In consequence, the appellant's defence ought not to have been struck out.

[17] For reasons stated above, I allow the appellant's appeal with costs. The costs of getting up fees in this case should not exceed RM5,000. If costs cannot be agreed, the appellant are at liberty to tax their costs accordingly. I hereby order so.

Appellant's appeal allowed with costs.

Reported by Chew Phye Ken